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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 356

In re. ESTATE OF RAYMOND B. TRIPP, Deceased

WILLIAM A. TRIPP,
Petitioner,

vs.

IRENE F. TRIPP,
Respondent

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

WILLIAM J. GRIFFIN,
ROBERT C. BOYER,
GRIFFIN, SEELY, BOYER & GILLEO,
2516 Guardian Building,
Detroit 26, Michigan,*
Counsel for Petitioner.

Interstate Brief & Record Co., 356 Congress St. E., Detroit 26, Michigan

SUBJECT INDEX

	Page
Statement of the Case	1-2
Argument	2-7
1. Nature of Probate Proceedings described as being one "in rem" does not eliminate proper notice to non-resident heirs under due process requirements of Mullane case	2-4
2. South Carolina Courts are not bound by the Ohio Probate Decree where there is a question of jurisdiction over the subject matter and person	5
3. Section 2107.12 of the Ohio Probate Code permitting a contest on the jurisdiction of the probate court at the time of presenting the will to probate does not apply to Petitioner who did not have notice of the presentation of the will for probate	5-6
4. Mere knowledge of a probate proceedings does not waive the legal requirement of written notice under the due process clause	6-7
Conclusion	7-8

INDEX TO AUTHORITIES CITED

Burbank v. Ernst, 232 U.S. 162, 58 L. Ed. 551, 345 Ct. 299	5
Hines v. Cowles, 18 Ohio Cir. Ct. (N.S.) 518; affirmed 86 Ohio St. 350	5
Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306, 94 L. Ed. 865, 703 Ct. 652	2-3
Scholl v. Scholl, 123 Ohio St. 1, 173 N.E. 705	6
Stacey v. Cunningham, 69 Ohio St. 176, 67 N.E. 292	6
Wuchter v. Pizzutti, 276 U.S. 13, 48 S. Ct. 250, 72 L. Ed. 446	6

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Petitioner replies herein to Respondent's Brief in Opposition to the Petition for Writ of Certiorari in the same order of propositions as presented in Respondent's Brief.

STATEMENT OF THE CASE

First, petitioner desires to correct the inference contained in respondent's brief (pp. 5 and 6) to the effect that the South Carolina Courts examined the evidence submitted

to the Probate Court on the question of domicile and decided the domicile question from such evidence. The order of the Probate Court shows it did not consider or reach any conclusion from the evidence, since it held it is bound by the order of the Ohio Probate Court admitting the will to probate (R. 32).

The Common Pleas Court of South Carolina agrees with the Probate Judge that the Ohio decree was conclusive on domicile in Ohio and that the courts of South Carolina have no authority to reach a different conclusion (R. 37). It did not, in any way, discuss the evidence relative to such domicile question.

Although the South Carolina Supreme Court made a reference to some statements in the evidence on domicile being conflicting, this was unnecessary in view of its affirmance of the decisions of the two lower courts that the South Carolina Courts are bound by the Ohio proceedings admitting the will.

ARGUMENT

1. Nature of Probate Proceedings described as being one "in rem" does not eliminate proper notice to non-resident heirs under due process requirements of Mullane case.

Respondent's Brief asserts the proposition that a proceeding to probate a will is one "*in rem*" and therefore does not require notice to decedent's non-resident heirs such as petitioner. She states (p. 7) that such a probate proceedings is not subject to due process requirements relative to notice.

However, such a proposition disregards the basic principles established in *Mullane v. Central Hanover Bank and*

Trust Co., 339 U.S. 306, 94 L. Ed. 865, 70 S. Ct. 652 to the effect that due process in any proceedings which is accorded finality requires notice reasonably calculated, under all the circumstances, to apprise interested parties of the pending action and afford an opportunity to be heard. No distinction is made between "*in rem*" and "*in personam*" by the court. In fact on page 313 the U.S. Supreme Court says:

> "* * * whatever the technical definition of its chosen procedure, the interest of each state in providing means to close the trusts that exist by the grace of its laws and are administered under the supervision of its courts is so insistent and rooted in custom as to establish beyond doubt the right of its courts to determine the interests of all claimants, resident or non-resident. * * *"

The "interest" of the claimant is nonetheless one which is protected by such notice whether or not it is called an "expectancy", "right to inherit" or some other title for the Ohio probate order admitting the will has the effect of cutting off petitioner's claim to decedent's property. This is a very real and definite property interest on the part of petitioner which is lost. Such action taken without notice to petitioner deprives him of a right to cross-examine witnesses and be heard in opposition to the application in Ohio.

In the *Mullane Case* personal service by mail to known beneficiaries of a known place of residence was required. Statutory publication was not enough for due process to such persons and respondent's reference to the records of Cuyahoga County Probate Court (p. 8) is even less satisfactory for notice of the probate application to petitioner, a non resident whose address is known. As stated in the *Mullane* case the reasons disappear for use of anything

less than the mails to apprise interested parties of a pending action when the names and post office addresses of those affected by a proceedings are available. This was not done by the Ohio Probate Court because the Ohio statute did not require it.

When the defendant's address is known the method of notice most likely to give actual knowledge of the proceedings without unduly hampering the courts should be required. Notice by regular mail in addition to publication would seem to accomplish this. Furthermore, there is no reason to distinguish between residents and non residents, the latter having as much right to protect their interests, and therefore to reasonable notice as residents. Notice by mail could reach either with equal ease. A distinction between "*in rem*" and "*in personam*" is similarly unjustified as the necessity for notice to a non resident heir-at-law is just as great as a resident heir-at-law. If anything, there is greater need for notice to the non resident heir.

It is unfortunate that some states have not brought their legislation regarding notice to interested parties into conformity with the *Mullane* doctrine. Both South Carolina and Ohio are examples of two states that have not done so. It is respectfully submitted that this is the time to correct this situation by declaring that part of the Ohio statute invalid under the due process clause where no provision is made for notice to a non resident heir-at-law of a decedent in a probate proceeding to admit a will to probate.

2. South Carolina Courts are not bound by the Ohio Probate Decree where there is a question of jurisdiction over the subject matter and person.

Respondent relies upon a South Carolina statute permitting recognition of a foreign probate will. However, this statute does not apply where the foreign decree or judgment lacks facts necessary to give that Court jurisdiction. Want of jurisdiction may be shown as to either the subject matter or the person.

Where the jurisdiction to probate a will depends upon the domicile of the deceased at the time of his death the finding of a probate court that such domicile was in its state does not bind the probate court of another state where the probate of the same will is sought. *Burbank v. Ernst*, 232 U.S. 162, 58 L. Ed. 551, 345 Ct. 299. See other cases cited on page 49 of petition. Even the Ohio courts have held that the decisions of its probate courts in probating wills bind Ohio courts only and not courts in any other state. *Hines v. Cowles*, 18 Ohio Cir. Ct. (N.S.) 518; affirmed 86 Ohio St. 350.

3. Section 2107.12 of the Ohio Probate Code permitting a contest on the jurisdiction of the probate court at the time of presenting the will to probate does not apply to Petitioner who did not have notice of the presentation of the will for probate.

Respondent's reference to this provision of the Ohio statute does not help petitioner because he had no notice of the application or presentation of the will for probate. In fact Ohio provides for no notice at all to non resident heirs at any time in a probate proceedings—even during the six month's period that such an interested person could

contest the admission of a will. Actually petitioner learned about the will after the will had been admitted and the jurisdictional question presumably passed upon. Hence if petitioner wanted to contest the will, he had to waive the question of probate court jurisdiction. *Stacey v. Cunningham*, 69 Ohio St. 176, 67 N.E. 292. This is not due process of law as outlined in the second proposition of the petition (page 15).

4. Mere knowledge of a probate proceedings does not waive the legal requirement of written notice under the due process clause.

Respondent as a final argument says that petitioner had actual knowledge of the probate proceedings prior to the expiration of the six month contest period and therefore receiving written notice would be of no consequence. It is a basic concept of our jurisprudence that jurisdiction over the subject matter and the person is necessary. Although a defendant may have full knowledge that an action has been commenced against him, a court nevertheless lacks jurisdiction to enter a judgment against him unless jurisdiction over the person has been obtained in compliance with the law designating the method of obtaining such jurisdiction. *Wuchter v. Pizzutti*, 276 U.S. 13, 48 S. Ct. 259, 72 L. Ed. 446. See also, *Scholl v. Scholl*, 123 Ohio St. 1, 173 N.E. 305.

The lack of providing notice to non resident heirs whose addresses are known in the Ohio statute is nonetheless a due process objection which is contrary to the requirements set out in the *Mullane* decision. Mere knowledge of the pendency of the probate proceedings in the absence of an appearance or a written waiver does not remove the objection. Actually, petitioner did not learn of the probate

proceedings until after the will had been admitted to probate. Then his choice of contesting the will so admitted in a separate court required a waiver of the jurisdiction question in the probate court, *Stacey v. Cunningham, supra.*

Under such circumstances this is not due process of law and petitioner has been deprived of an opportunity to be heard and cross-examine witnesses at the hearing on the application for admission of the will to probate.

CONCLUSION

For the reasons heretofore stated in his Petition and this Reply, Petitioner respectfully urges this Honorable Court to grant a writ of certiorari to review the proceedings of the South Carolina Supreme Court and the lower courts. Only by granting the writ can the undisputed facts indicating decedent's domicile in South Carolina be established rightfully and petitioner eventually be given an opportunity to be heard on the question of decedent's mental capacity to make a will. Also the exercising of such discretionary power on the part of the United States Supreme Court will make possible the application of the *Hultane* doctrine of notice to the field of probate law and administration in a very significant and helpful manner. Too many states have disregarded or unduly limited its scope. By indicating the extent and manner of notice required for non resident heirs whose address is known in a probate proceedings, this court can assist materially in creating stability and certainty in the devolution of testate and intestate property, both real and personal, throughout the country. Petitioner respectfully hopes that this Honorable Court will not pass over this opportunity in its crowded

calendar to do justice in this case and determine the constitutional questions involved.

Respectfully submitted,

WILLIAM J. GRIFFIN,

ROBERT C. BOYER,
GRIFFIN, SEELY, BOYER & GILLEO,
2816 Guardian Building,
Detroit 26, Michigan,
Counsel for Petitioner.